

No. \_\_\_\_\_

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In The  
Supreme Court of the United States

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MICHAEL ANTHONY HOFFMAN,  
*Petitioner,*

v.

STATE OF FLORIDA,  
*Respondent.*

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On Petition for Writ of Certiorari to the  
First District Court of Appeal  
State of Florida

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- I. Whether the shoulder of a public street, owned by the Jacksonville Aviation Authority, but approximately one mile from the Jacksonville International Airport, should be treated as an airport and, therefore, a traditional non-public forum, or should be treated as a public street or sidewalk and, therefore, a quintessential public forum, for purpose of First Amendment forum analysis.
- II. Whether a public airport authority's reservation of a right to disapprove an "application for protest" upon an applicant's ability to "demonstrate adequate financial capacity or responsibility to undertake the proposed use" or alternatively upon an applicant's ability to "obtain a bond or insurance in a type and amount required by the Authority for the proposed use," provides a "reasonably specific and objective" standard for approval of such applications, as required by *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324, 122 S.Ct. 775, 781, 151 L.Ed.2d 783 (2002).

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## **OPINIONS AND ORDERS BELOW**

Opinion affirming the Duval County Court's denial of Petitioner's Motion to Dismiss, Motion for Judgment of Acquittal, and Motion for New Trial, and remanding the case to the Duval County Court for further proceedings, entered on June 19, 2017 by the Fourth Judicial Circuit Court, Duval County, Florida.

Order, denying Petitioner's Petition for Writ of Certiorari, entered on June 20, 2018 by the First District Court of Appeal of the State of Florida.

## **JURISDICTION**

Petitioner seeks review of the Opinion affirming the Duval County Court's denial of Petitioner's Motion to Dismiss, Motion for Judgment of Acquittal, and Motion for New Trial, and remanding the case to the Duval County Court for further proceedings, entered on June 19, 2017 by the Fourth Judicial Circuit Court, Duval County, Florida. This Court's jurisdiction is invoked under 28 U.S.C. § 1257. The petition is timely filed pursuant to Justice Thomas' November 8, 2018 Order, extending the time within which to file a petition for a writ of certiorari in this case up to and including November 16, 2018.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

### **The First Amendment to the United States Constitution provides:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

### **Section 810.09(1)(a), Florida Statutes, provides:**

(1)(a) A person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance:

1. As to which notice against entering or remaining is given, either by actual communication to the offender or by posting, fencing, or cultivation as described in s. 810.011; or

2. If the property is the unenclosed curtilage of a dwelling and the offender enters or remains with the intent to commit an offense thereon, other than the offense of trespass, commits the offense of trespass on property other than a structure or conveyance.

## STATEMENT OF THE CASE

On August 12, 2014, at approximately 3:30 p.m., Petitioner was arrested and later charged by Information with a single count of trespassing, in violation of FLA. STAT. § 810.09. Prior to his arrest, Petitioner had been walking along the shoulder of Yankee Clipper Drive, a public street in Jacksonville, Florida, carrying two signs with political speech on both sides. One sign read "Police State" on one side and "Liars Investigate Liars" on the other side. The other sign read, "F??k the T.S.A." on one side and "I.R.S. = Terrorist" on the other side. At the time, although Petitioner was on Jacksonville Aviation Authority ("JAA") property, he was approximately one mile from the closest JAA airport terminal. It is undisputed that Yankee Clipper Drive is a public street with multiple outlets, and that it is used daily by all types of motorists for purposes unrelated to the JAA or Jacksonville International Airport.

JAA police officers drove up to Petitioner, exited their vehicles, and advised Petitioner that he would need permission from JAA to be where he was walking, specifically and only because he was carrying signs with speech on them. The officers provided Petitioner an "Application for Permit for Solicitations, Picketing, Demonstrations, Special Events Request for Approved Locations."

Section 3-7 of JAA Rules and Regulations governs solicitations, picketing, demonstrations, and special events on JAA property:

(a) Conduct of or participation in solicitation, picketing, demonstrating, parading, marching, patrolling, sit-ins, sit-downs, or other related activities and/or assembling, carrying, distributing, or displaying pamphlets, signs, placards, or other material is prohibited without prior written permission of the Authority. (1) When approved by the Authority, such activities shall only be conducted in those areas identified by the Authority. (2) The process to obtain Authority permission is set forth in the Appendix.

Additionally, in Section 1-8 of JAA Rules and Regulations, JAA reserves the right to disapprove any application, including applications for protest or picketing, if the person or entity applying does not “demonstrate adequate financial capacity or responsibility to undertake the proposed use” or if the person or entity “cannot obtain a bond or insurance in the type and amount required by the Authority for the proposed use.” The JAA Rules and Regulations provided no standards or guidelines for determining such “adequate financial capacity” or “the type and amount” of “bond or insurance”.

Because Petitioner had not obtained pre-clearance to carry signs with speech on them, the JAA police officers issued Mr. Hoffman a trespass warning and ordered him to depart from the shoulder of the public street. Believing that JAA’s Protest Permitting Regulation was unconstitutional

and unenforceable, Petitioner declined to depart, and thereafter, the JAA police officers arrested him. On September 3, 2014, the State of Florida filed its one-count Information, charging Petitioner with trespass after warning. *See* Fla. Stat. § 810.09. Petitioner was convicted following a jury trial on July 8, 2015.

Petitioner timely filed a direct appeal to the Circuit Court of the Fourth Judicial Circuit of Florida, and on June 19, 2017, the Circuit Court entered its six-page Opinion, affirming Petitioner's conviction. On July 19, 2018, Petitioner timely petitioned to Florida's First DCA for the issuance of a Writ of Certiorari, and on June 20, 2018, the First District Court of Appeal entered its Order denying Petitioner's Petition.

## REASONS FOR GRANTING THE PETITION

- I. The Florida Circuit Court improperly treated the location of Petitioner's arrest as an "airport" rather than as a "public street" or "public sidewalk".

In its Opinion, the Florida Circuit Court concluded that, "At the time of his arrest, the [Petitioner] was taken into custody on the side of the road at the main entrance to Jacksonville International Airport." However, the undisputed record reveals that Jacksonville International Airport and all of its terminals are approximately one mile from the location on the shoulder of a public road where Petitioner was arrested. The State of Florida contends that the location of Petitioner's arrest should be treated no different from JAA's airport terminals, traditional non-public forums, for purposes of First Amendment forum analysis. However, Petitioner respectfully states that, in spite of JAA's ownership of the real estate surrounding Yankee Clipper Drive, Petitioner was standing on the shoulder of a public road, and therefore, the location should be treated as a quintessential public forum for purposes of First Amendment forum analysis.

The Florida Circuit Court concluded that, "As for airport property, it is a non-public forum . . ." (citing *ISKCON Miami, Inc. v. Metropolitan Dade County*, 147 F.3d 1282 (11th Cir. 1998)). However, the Eleventh Circuit in *ISKCON Miami, Inc.* held only that airports are non-public fora, not that real estate that happens to be owned by a municipal

airport authority are non-public fora. *See* 147 F.3d at 1286-88 (interpreting and applying *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992), and concluding, “*Lee’s* determination that airports are not public for a was not limited to the particular airports at issue, but constituted a categorical determination about **airport terminals** generally.” (emphasis added)).

The Eleventh Circuit arguably expanded the U.S. Supreme Court’s holding in *Lee* by concluding that “the sidewalks and parking lots surrounding the MIA terminal buildings” are also non-public fora. *Id.*, at 1289. The Court explained,

Like the sidewalks adjoining the post office at issue in *Kokinda*, the sidewalks and parking lots adjacent to the Miami airport terminals are nonpublic fora; the sidewalks and parking lots are intended by the County to be used for air travel-related purposes, “not to facilitate the daily commerce and life of the neighborhood or city.” *Kokinda*, 497 U.S. at 728, 110 S.Ct. 3115 (plurality opinion). The County maintains that the incompatibility between solicitation and sales and the purposes of the airport reaches its zenith on the sidewalks outside the terminal:

The sidewalks are narrow and extremely congested areas

where passengers check their baggage at fixed booths, skycaps wheel carts full of luggage, conveyor belts are used to move baggage and packages, and taxis, vans, and private vehicles drop off and pick up passengers. Due to the layout of the Airport, even a brief delay of persons in these areas can lead to extreme congestion and danger of an accident.

Affidavit of Winona (Dickie) K. Davis, R-1-19-Exh. 1 ¶ 14. It is certainly reasonable for the County to conclude that solicitation and sales of literature would be inconsistent with the particularly hectic nature of the airport sidewalks at MIA.

*Id.*, at 1289-90. The Eleventh Circuit's explanation here illuminates its reasoning that "***in this case***, the regulations prohibiting solicitation and sales anywhere on airport property constitute a reasonable restriction ***in the context of the particular nature and purpose of MIA***." *Id.*, at 1289 (emphasis added). However, the Florida Circuit Court's conclusion that the shoulder of a public road, approximately a mile from the nearest airport terminal, in an area through which citizens who have no "air-travel related purposes" routinely transit, is a non-public forum, cannot be reconciled with this Court's First Amendment forum jurisprudence.

JAA owns the real estate surrounding the public road beside which Petitioner was arrested. If this Court were to adopt the State of Florida's contention, as the Circuit Court did, that this Court's analysis should be limited to a review of the real estate property records, any municipality could limit, suppress or chill its citizens' free speech rights by consolidating its land holdings within its local, municipal or regional airport authority. Such a holding would be unsupported by this Court's First Amendment forum jurisprudence, and would be an unprincipled expansion of this Court's holdings in *U.S. v. Kokinda*, 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (sidewalk outside postal building was not a traditional public forum, because "[t]he sidewalk was constructed *solely* to provide for the passage of individuals engaged in postal business, not as a public passageway.") (emphasis added) and *Lee*, 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) ("The regulation governs only the terminals; the Port Authority permits solicitation and distribution on the sidewalks outside the terminal buildings").

Petitioner respectfully believes that he was in a quintessential public forum at the time of his arrest, and that the mere fact that JAA owns the surrounding real estate does nothing to upset what would otherwise be beyond dispute. *See Snyder v. Phelps*, 562 U.S. 443, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011) ("Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a special position in terms of First Amendment protection. We have repeatedly referred to public

streets as the archetype of a traditional public forum, noting that time out of mind public streets and sidewalks have been used for public assembly and debate.”) (citations, brackets, and quotations omitted).

- II. JAA’s reservation of a right to disapprove an “application for protest” upon an applicant’s ability to “demonstrate adequate financial capacity or responsibility to undertake the proposed use” or alternatively upon an applicant’s ability to “obtain a bond or insurance in a type and amount required by the Authority for the proposed use,” fails to provide a “reasonably specific and objective” standard for approval of such applications, and “leaves the decision to the whim of the administrator as required,” contrary to this Court’s holding in *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324, 122 S.Ct. 775, 781, 151 L.Ed.2d 783 (2002).

In *Thomas v. Chicago Park Dist.*, this Court held that, “[w]here the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.” 534 U.S. 316, 323, 122 S.Ct. 775, 780, 151 L.Ed.2d 783 (2002).

In *Burk v. Augusta-Richmond City*, an individual and organizations brought a pre-enforcement challenge to a county ordinance that created permitting requirements for public demonstrations consisting of five or more people.

365 F.3d 1247, 1249 (11th Cir. 2004). The Eleventh Circuit observed that the county ordinance at issue require[ed] permit applicants to indemnify the County for damages arising from a planned protest or demonstration:

[T]he applicant shall provide an indemnification and hold harmless agreement in favor of Augusta, Georgia and its elected officials, the Augusta–Richmond County Commission, the Sheriff of Richmond County, and their officers, agents and employees in a form satisfactory to the attorney for Augusta, Georgia.

[Augusta–Richmond County Code] § 3–4–11(a)(3).

*Id.*, at 1255. The plaintiffs-appellants argued that “this provision grants the county attorney excessive discretion, imports content-based criteria into the permitting process, and is overbroad and chills speech.” *Id.*, at 1255. The Eleventh Circuit agreed that it grants excessive discretion to the county attorney and therefore declined to reach the other constitutional arguments. *Id.*, at 1255-56.

The Augusta-Richmond County Code is materially indistinguishable from the JAA protest permitting regulation at issue herein with respect to the indemnification provisions. Like the ordinance, the JAA protest permitting regulation vests unfettered discretionary authority with the JAA, which can deny a permit application if a permit applicant cannot “demonstrate adequate financial

capacity or responsibility to undertake the proposed use” or if the permit applicant “cannot obtain a bond or insurance in the type and amount required by the Authority for the proposed use.”

As the Eleventh Circuit explained:

Even a facially content-neutral time, place, and manner regulation may not vest public officials with unbridled discretion over permitting decisions. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–51, 89 S.Ct. 935, 938–39, 22 L.Ed.2d 162 (1969); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130–31, 112 S.Ct. 2395, 2401–02, 120 L.Ed.2d 101 (1992). Excessive discretion over permitting decisions is constitutionally suspect because it creates the opportunity for undetectable censorship and signals a lack of narrow tailoring. *See id.*; *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1362 (11th Cir.1999); *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666, 675 (11th Cir.1984). Therefore, time, place, and manner regulations must contain “narrowly drawn, reasonable and definite standards,” *Thomas*, 534 U.S. at 324, 122 S.Ct. at 781, “to guide the official's decision and render it subject to effective

judicial review,” *id.* at 323, 122 S.Ct. at 780.

We readily conclude that the indemnification provision in the Augusta–Richmond Ordinance fails to provide adequate standards. It requires an indemnification agreement “in a form satisfactory to the attorney for Augusta, Georgia,” § 3–4–11(a)(3), and gives no guidance regarding what should be considered “satisfactory.” Thus, the requirement is standardless and leaves acceptance or rejection of indemnification agreements “to the whim of the administrator.” *Thomas*, 534 U.S. at 324, 122 S.Ct. at 781 (citing *Forsyth County*, 505 U.S. at 133, 112 S.Ct. at 2403).

*Burk*, 365 F.3d at 1256. For purposes of this appeal, the only material difference between the instant appeal and the *Burk* appeal is that, whereas in *Burk*, the County defended the ordinance, the State of Florida did not even attempt a defense of the JAA’s indemnification provision in the Circuit Court.

Because JAA’s protest permitting regulation fails to delineate precise standards, or any standards, regarding the financial capacity, insurance or bond for a prospective permittee, the protest permitting regulation is unconstitutional and unenforceable. Because JAA’s unconstitutional protest permitting regulation served as the sole

basis for the trespass warning that was issued to Petitioner, and because Petitioner was arrested solely for failing to comply with same, the Florida Circuit Court erred by enforcing the JAA speech and protest regulation.

### CONCLUSION

Wherefore, Petitioner prays that this Honorable Court grant a writ of certiorari and reverse the Opinion of the Florida Circuit Court.

Respectfully submitted,

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